Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1953

No. 787 53

UNITED STATES OF AMERICA,
Petitioner,

versus

ROY F. BRASHIER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENT.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 767.

UNITED STATES OF AMERICA,
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versus

ROY F. BRASHIER,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

The judgments of the court below were entered on April 10, 1953 (R. 25). Jurisdiction is invoked by the Government under 28 U. S. C. Sec. 1254 (1).

QUESTION PRESENTED.

Whether, in a perjury indictment, when the Government neglects, or deliberately refuses to name or otherwise identify the person who allegedly administered the oath and his authority so to do, this Court should grant

certiorari to cure the deficiency by Court decision instead of remitting the Government to its remedy by a new indictment. As the alleged offenses occured in April, 1951 no Statute of Limitations is involved.

STATUTES & RULE INVOLVED.

These are set forth in the Government's petition for the writ at pp. 2-4; the pertinent portion of each indictment is set at p. 4 petition.

STATEMENT.

It should be emphasized the oath herein is alleged to have been taken before a Sente Subcommittee, not before a Court, or the clerk thereof, or a Grand Jury, or a Notary Public. The indictment alleges the defendant "duly" took the oath before the Subcommittee, "a competent tribunal", without naming or otherwise identifying the person, whether Senator, Clerk, counsel, court reporter, Notary or what have you, who is supposed to have administered it.

REASONS WHY THE WRIT SHOULD BE DENIED.

1. The decision below is of no public importance and there is no conflict with any other circuit, *U. S. v. Bickford*,

168 F. (2) 26 not being in point. The decision below was correct in law and in common-sense.

2. The Government has an easy remedy by re-indictment, to which there is no conceivable obstacle. This Court's functions are too important to permit its utilization to repair a minor official's omissions or perhaps the Government's deliberate refusal to make a traditional and common-sense allegation—a bare legal minimum in a perjury indictment.

ARGUMENT.

By the *Crimes Act of April 30, 1790* (1 Stat. 112, 116), later *R. S.* 5396 and still later 18 *U. S. C.* (1940 Ed.) Sec. 558 Congress set forth the requirements of a perjury indictment, one of which was to be the allegation "by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same." The statute was modelled after that of 23 *George II*, Ch. 11 (7 *Brit St. at L.* (Ed. 1769) p. 221; 2 *Alexanders Brit. Stat.* p. 766; *U. S. v. Walsh*, 22 F. 644; 2 Wharton Cr. L. (12th Ed.) Sec. 1554.) and was designed to state the essential ingredients of the offense, relieving the Government of the necessity of setting forth "the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or in equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed" (1 *Stat.* 112, 116; 18 *U. S. C.*

(1940 Ed.) Sec. 558). The statute of 23 Geo. II, Ch. 11, which is still in force in the District of Columbia [1] is referred to by Wharton as "almost part of the common-law" (2 *Wharton Cr. L.* (12th Ed.) Sec. 1654) and was designed to relieve the Government of the hardship of the old practice (*U. S. v. Deming*, Fed. Cas. No. 14,945; Cf. *Danaher v. U. S.*, 39 F. (2) 325, 326). It is still in force, in an abbreviated form, in England, the *Perjury Act of 1911* (c.6) S. 11 providing that it is sufficient for the indictment "to set forth the substance of the offense charged, and before which court or person (if any) the offense was committed". (5 *Halsbury's Laws of Engl.* p. 966.)

The Government now asserts that the bare minimum requirements of 18 *U. S. C.* (1940 Ed.) Sec. 558 the successor statute has been still further whittled down by the omission of that provision in the 1948 revision of the Criminal Code. It gives no reason why Congress in 1951 re-enacted the same statute for the District of Columbia (*D. C. Code* (1951 Ed.) Ch. 23 Sec. 204), which it admits is there in full force and effect (Gov. Pet. p. 7 footnote 2). It simply says Rule 7(c) F R Cr. P was intended to abolish outworn technical concepts by providing that the indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Under the perjury statute, 18 *U. S. C.* Sec. 1621 it is an essential element of the offense that the oath be taken before "a competent tribunal, officer or person".

[1] It was taken over as part of the common-law of Maryland by the *Act of March 3, 1901, 31* Stat. 1189, ch. 854 Sec. 1 (2 *Alexanders Brit. Stat.* p. 766, *Deckard v. State*, 38 Md. 201) and continued in force by *D. C. Code (1951 Ed.)* Chap. 23 Sec. 204.

The indictment meets these requirements, the Government says, by alleging the oath was taken before a "competent tribunal", i.e. the Senate Subcommittee."

As the indictment does not name the "officer" or "person" before whom the oath was taken it is obvious the Government proceeds under that part of 18 *U. S. C.* Sec. 1621 dealing with oaths before a "tribunal". But it cites no authority that a Senate Subcommittee is a "tribunal". In *U. S. v. Meyers*, 75 F. Supp. 486, 487 a Federal Court held a Senate Subcommittee was not a tribunal and only sustained the indictment because it alleged the oath was taken before Senator Ferguson, the chairman of the Subcommittee, who, the court said, was obviously an "officer" or "person" under the other part of the perjury statute. The court said "the word 'tribunal' implies an officer or body having authority to adjudicate matters". Both *Webster's Unabridged Dictionary* and *Black's Law Dictionary* define tribunal as a court of justice.[1] Unless a Senate Subcommittee is a "tribunal" it follows, by definition, that the Government has not alleged an essential fact under either the perjury statute, 18 *U. S. C.* Sec. 1621 or *Rule 7(c) F R Cr. P.* The Government, it seems clear, does not propose to offer any proof at the trial that the Subcommittee is a "tribunal"; its transparent plan will be to contend that whoever administered the oath was an "officer" or a "person" under the other part of the statute. The obvious reason is that the Senate

[1] See also *12A Words & Phrases* (Perm. Ed.) p. 223 and cases cited. "Tribunal" has also been defined as "the seat of a judge; the place where he administers justice, a judicial court; the bench of judges" (*64 C. J.* p. 1303). A court is usually defined as a tribunal (*Dixon v. People*, 53 Colo. 527; *Mascall v. Drainage Dist.* 122 Ill. 620, 623; People v. Haverstrow 151 N. Y. 75, 84).

Subcommittee qua "tribunal" has no power to administer an oath; under 2 U. S. C. 191 the oath can only be administered by a living person, i.e. a Senator.

It is not only law but common-sense that the person before whom the oath was taken should be named in the indictment as held by the court below and in *Hilliard vs. U. S.* 24 F(2) 99, 100.

The Government (pet. p. 12) calls it a detail of proof which if needed can be obtained by a motion for a bill of particulars—which the Government invariably resists.[1] In *U. S. v. Rosenbaum*, D. C. U. S. for Dist. Col. No. 1722-51 the court *denied* a bill of particulars which asked for the very item in question, i.e. the name of the person administering the oath. The truth is the Government cannot guarantee what a court will grant or deny; the way to solve the problem is to avoid it by naming the person in the indictment, as was done in *U. S. v. Meyers*, 75 F. Suppl. 486; *Markham v. U. S.*, 160 U. S. 319, 320; *U. S. v. Curtis*, 107 U. S. 671; *Danaher v. U. S.*, 39 F. (2) 325, 326; *Travis v. U. S.*, 123 F. (2) 268, 269; *U. S. v. Dosher*, 133 F. (2) 757, 758; *Levy v. U. S.*, 271 F. 942 and countless other cases.[2]

An indictment alleging that the oath was taken "before a Commissioner of the United States duly appointed" was specifically held bad in *U. S. v. Wicox*, Fed. Cas. No.

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[1] As it did in the five D. C. perjury cases cited in its petition p. 7, also, courts grant bills of particulars in their discretion which will not be reversed except for abuse (*Wong Tai v. U. S.*, 273 U. S. 77, 82).

[2] Or by identifying the person i.e. the court clerk as in *U. S. v. Bickford*, 168 F. (2) 26, 27.

16,692. The distinction between indictments for perjury before a court or before an officer or person is obvious. If before a court the powers of the judge or the clerk may be judicially noticed; these are the only two persons who can possibly administer the oath in court proceedings. But if before a Subcommittee there can be no advance agreement that only a competent person such as a judge or the court clerk could possibly have administered the oath. The validity of the oath would obviously depend on who did the job and he must be a living person not an abstraction. Hence the English cases hold that if the oath is taken before a court the fact that it was taken in judicial proceedings must be alleged for this infers the presence of the judge and the clerk either of whom could function.[1] This requirement was not dispensed with by the statute of 23 Geo. II Ch. 11.[2] Where however the oath is taken before a Commissioner or on inferior court circumstances must be alleged to show the authority to administer the oath and this connotes at the very least the name of the person claiming the authority.[3]

The Government's claim that the statute regulating perjury indictments (18 U. S. C. (1940 Ed.) Sec. 558) has been repealed by Rule 7(c) F R Cr P (though not for the District of Columbia) is an irrelevancy if, as we contend, a senate subcommittee is not a tribunal.[4] But in any

[1] *Stedman's Case*, Cro. Eliz. 187, 78 E. R. 393; *R. v. Dunning*, (1871) 40 L. J. M. C. 58; *R. v. Bishop*, (1842) Car. and M. 302, 6 J. P. 218; *R. v. Overton*, (1843) 4 Q. B. 83; *R. v. Bartlett*, 1 Dow & L. 95, L. J. M. C. 127, 7 J. P. 578; *R. v. Pearson*, (1837) 8 C & P. 119; *R. v. Kennedy*, (1885) 7 Newfoundland F. R. 91.

[2] *Overton v. R.*, 4 Q. B. 83; 3 G & D 133; 12 L. J. M. 61; 7 Jur. 196.

[3] *R. v. McDonald*, (1905) 21 Cox C. C. 70; *R. v. Lawlor*, (1853) 6 Cox C. C. 187 (Ire).

[4] The Government admits (pet. p. 11) "It is of course, still essential under Rule 7(c) and the perjury statute that the indictment allege that the oath was taken before proper authority."

event the failure to re-enact the statute is unimportant. The principle, under cases already cited, is so solidly imbedded in the law that no statute is required. There are plenty of examples that omission of well-known principles from codes is no indication of repeal. Thus the principle laid down in the *Judiciary Act of 1789*, Sec. 32 that on appeal no reversal shall be had for a defect of form was not repealed by its omission from the *Judicial Code* of 1948.[1] Similarly no one has ever supposed that omission of Sec. 37 of the *Judicial Code* (28 *U. S. C.* Sec. 80) from the 1948 revision repealed the requirement that Federal Courts must *sua sponte* dismiss for lack of jurisdiction.[2] Nor did the re-enactment of 18 *U. S. C.* Sec. 641 repeal the requirement of criminal intent in embezzlement cases.[3]

There is no conflict between the decision below and *U. S. v. Bickford*, 168 F. (2) 28. The indictment there alleged the defendants testified falsely in the United States District Court for Montana and that the oath was administered by "the clerk of said court." The clerk was therefore identified; no one expects or wants his baptismal name. In the present case however no one knows who is alleged to have administered the oath, whether senator, clerk, counsel for the committee, notary, court reporter or other person. If by a senator there is no allegation he was the Subcommittee, or a member of it.[4] There is likewise no conflict with *Roberts v. U. S.*,

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[1] It was later re-inserted by the *Act of May 24, 1949* C. 139 Sec. 110, 63 *Stat.* 105, 28 *U. S. C.* Sec. 2111 because the *FRCP* applied only to District Courts (1949 *U. S. Code Cong. Serv. p.* 1272, Sec. 110).

[2] See Reviser's Notes to 28 *U. S. C. Judicial Code & Judiciary* Sec. 1359 —"omitted as unnecessary."

[3] *Morissette v. U. S.*, 342 U. S. 246.

[4] Under the rules of the senate any senator can sit on a committee or subcommittee, whether a member of it or not. With the consent of the chairman he can interrogate witnesses.

137 F. (2) 412, 414 (C. A. 4) or with *U. S. v. Polakoff*, 112 F. (2) 888, 890 (C. A. 2). The first case was under the False Claims Statute (18 U. S. C. (1940 Ed.) Sec. 80); the second was for influencing and impeding the actions of court officers. In neither case were the names of the officials the essence of the offense. In the present case the opposite is true; if the official had no authority to administer the oath there could be no offense. Hence the least we can expect is the allegation of his name, or identity and the disclosure of his authority.

Equally unconvincing is the Government's argument that the charge in the indictment that the oath was "duly" taken solves all problems. "Duly" is about as bare a legal conclusion as the law knows and *Rule 7(c) FR CP* requires facts, not conclusions.[1] "Duly" means in a proper way, or regularly, or according to law,[2] and appears to refer here to the form of the oath as distinguished from the person administering it.[3] In *U. S. v. Deming* Fed. Cas. No. 14,945 an indictment for perjury before a United States Commissioner "duly" appointed was specifically held bad for absence of essential facts.

Lastly, the District of Columbia cases cited by the Government in its brief, p. 7, *U. S. vs. Rosenbaum, Dudley, Herschel Young, E. Merl Young & Lattimore* are no argument for the grant in the present case. In all these cases the court decided the Government was right; that

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[1] *Rule 7(c)* does not allow substitution of conclusions for facts. (*Alabama Packing Company vs. U. S.*, 167 F. (2) 179, 181).

[2] *Robertson vs. Perkins*, 129 U. S. 233, 234.

[3] "Duly" has a variety of meanings *18 Words & Phrases, Perm. Ed.* pp. 606-609; pocket part 1953 p. 168. In pleadings "duly" is a pure conclusion of law. (*Scott v. Chicago*, 205 Ill. 281, 68 N. E. 736, 737, 740; *Hanson v. Lanyan*, 9 N. Y. S. 625.)

the indictment need not name or otherwise identify the person before whom the oath was taken. A conflict with a District Court decision without more is no ground for certiorari (*Robertson & Kirkham, Jurisdiction of Supreme Court*, Sec. 825); it will be time to consider the point if and when the appellate court acts and creates the conflict.

CONCLUSION.

The history of this Court amply demonstrates that it attempts to select only the most important cases of the year for grants of certiorari. In the present case it is being asked—at a time when no Statute of Limitations could conceivably prevent a re-indictment—to repair the error of a clerk or a minor government attorney who has left out of an indictment what his own common-sense tells him ought to be in it. We suggest that the only way to make the Government obey the law is to refuse to bail it out of the predicament its own carelessness or utter pride of opinion has produced.

The petition should be denied.

Respectfully Submitted,

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